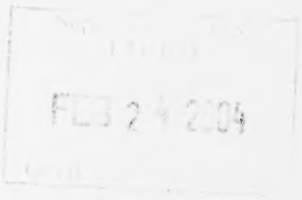

No. 03-995

SUPREME COURT
OF THE UNITED STATES
October Term, 2003

Words, Inc.,
Petitioner

v.

Norman Singer; Piper Marbury Rudnick
Wolfe, L.L.P.; Jackson & Campbell, P.C.
Singer and Associates, P.C., and John Craig,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE
DISTRICT OF COLUMBIA COURT OF
APPEALS

REPLY BRIEF OF PETITIONER

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February 23, 2004

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Petitioner's Argument in Reply

1. An Urgent Federal Question Is Presented under 28 U.S.C. §1257, and the D.C. Court of Appeals Could Not Have Acted Exclusively on Non-Federal Grounds.

In *Palmore v. United States,* 411, U.S. 389, 395 (1973), this Court specifically rejected respondents' central argument, *i.e.*, that the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, including D.C. Code §11-743, equated the D.C. Code with state law for purposes of 28 U.S.C. §1257 review. Respondents do not address *Palmore*.

Petitioner Words, Inc.'s rights under a statute of the United States are directly implicated in this case. 28 U.S.C. §1257. The respondents minimize the fact that Congress—not some state legislature—chartered the D.C. Court of Appeals and directed this court to "conduct its business according to the Federal Rules of Appellate Procedure unless the court prescribes or adopts modifications of those Rules." D.C. Code §11-743, Pub. L. No. 91-358 (1970).[1] The F.R.A.P. are prescribed by this Supreme Court of the United States under its authority set forth in 28 U.S.C. §2072, and interpretation of the F.R.A.P. bearing on Rule 4 notice of appeals and cross-appeals has recently supported allowance of a writ of certiorari. *Zapata Industries v. W.R. Grace & Co.*, 540 U.S.

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1. Compare the respondents' reference, brief at 13, to *Miller v. Anderson*, 150 U.S. 132, 136 (1893), in which jurisdiction was denied by this Court because the entire appeal centered on "not what rights passed to the state under the acts of Congress, but what authority the railroad company had under the statute of the state." (emphasis added).

____, 123 S. Ct. 31, dismissed by parties, Sup. Ct. R. 46.1, 123 S. Ct. 551 (2002).

This Words, Inc. Petition centers on the D.C. Court of Appeals interpretation of its own procedural rules that have been ordained by Congress to remain in perfect *pari materia* with the F.R.A.P. This petition thus involves a federally-chartered court in a unique, federal-enclave, subject to a federal statute that the court obey federal appeal rules.[2] Notably, Congress has barred the D.C. Council from altering the adoption of F.R.A.P. or from making any changes in the organization of the District of Columbia courts. D.C. Code §1-206.02(a)(4). Owing to the unique setting of the District of Columbia in the Constitution, Article One, §8, this Court has repudiated the respondents' facile argument that Acts of Congress pertaining to the District of Columbia should be treated as state statues for 28 U.S.C. §1257 inquiry. *Palmore v. United States*, *supra* at 1.[3] When the Congressional Act

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2. *Griffin v. United States*, 336 U.S. 707 (1948), cited by respondents for the argument that District of Columbia rules of evidence are purely local, is not relevant to this question concerning F.R.A.P. and was decided before the Congress granted limited home rule with a court system in the District of Columbia. See petitioner's discussion of *Key v. Doyle*, 434 U.S. 59 (1977) and *Palmore v. Untied States*, 411 U.S. 389 (1973), *infra*. Congress has not acted to impose the Federal Rules of Evidence upon the D.C. Court of Appeals.

3. Though not cited by respondents, *Key v. Doyle*, 434 U.S. 59 (1977), does not bar certiorari here. *Key v. Doyle* was decided before 28 U.S.C. §1257 was amended in 1988. *Key v. Doyle* held that an 1801, District of Columbia statute regulating devises and bequeaths to religious charities did not present a federal question for direct appeal to the Supreme Court after a D.C. Court had voided the local law for putative violation of First Amendment and Due Process Clause: "no

does, like D.C. Code 11-743, impose the nationwide F.R.A.P. upon a D.C. court, the presence of a federal question is unmistakable. "There is a distinction between an Act enacted for a purpose which is exclusive to the District of Columbia, and a statutory scheme which applied to the District of Columbia, as well as other entities." *Roth v. D.C. Courts*, 160 F. Supp. 2d 104, 108 (D.D.C. 2001).

When the federal question of the notice of appeal, functional equivalent doctrine matured before the D.C. Court of Appeals at petitioner's urging, it could no longer be disposed of on "non-federal" grounds. Supplemental Appendix No. 1 illustrates the extent to which petitioner pressed the F.R.A.P. functional equivalent argument to the D.C. Court of Appeals, requesting that this lower court reverse its denial of jurisdiction and consider the May 30, 2002 documents filed with the trial court as the functional equivalents of a timely notice of appeal of the May 15, 2002 summary judgment for defendants-respondents.[4] Though the

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right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application." *Key v. Doyle*, 434 U.S. at 68-69. By contrast, the Congress in 1970 used Pub. L. No. 91-358 to impose federal law and procedure upon the D.C. Court of Appeals. No serious argument can be made that D.C. Code §11-743 is merely " law of exclusively local application."

4. Respondents cannot argue that the failure of the D.C. Court of Appeals to take up the functional equivalent, notice of appeal issue under F.R.A.P. is an assertion of local variance. The D.C. Court of Appeals has interpreted its rules using analogous federal precedent for other notice of appeal controversies. Petition at 10-11. The functional equivalent, notice of appeal rule has also been applied by the U.S. Court of Appeals to accept disputed notices of appeal. See Petition at 8.

D.C. Court of Appeals did not favor the parties or this Court with a full opinion on the federal question, that silence cannot dispel the conclusion that the D.C. Court of Appeals thought it was complying with federal law when rejecting petitioner Words, Inc.'s functional equivalent argument and scuttling its appeal. *See Arizona v. Evans*, 514 U.S. 1, 7 (1995)(even if not clear from face of state court decision, federal questions is presented because this Court can assume state court believed it was complying with federal law); *Lee v. Kemna*, 534 U.S. 362, 375 (2002)(adequacy of state grounds is itself a federal question).

Respondents are unable to identify any instance in which the D.C. Court of Appeals has wielded the local variance language in D.C. Code §11-743, *i.e.*, "unless the court prescribes or adopts modifications of those Rules," to avoid application of this Court's functional equivalent rule for notices of appeal stated in *Smith v. Barry,* 502 U.S. 244 (1992) and *Houston v. Lack*, 487 U.S. 266 (1988).4 The texts of the disputed D.C. App. Rules 3 and 4 is sufficiently verbatim to F.R.A.P. 3 and 4 that no local variance argument is even presented. App. 13-16. Because denial of appeal jurisdiction by the D.C. Court is so contrary to this Court's jurisprudence on the functional equivalent interpretation for notices of appeal under F.R.A.P. 3 and 4, these respondents understandably make no effort to refute petitioner's reliance on this Court's Rules 10(b) and 10(c) to allow the writ. Abridgement of petitioner's rights under an Act of Congress and F.R.A.P., require assertion of this Court's supervisory authority and granting of the writ.

2. The Petition is Timely in All Respects.

The Respondents' argument that the present Petition is untimely is built upon the flawed premises that multiple petitions for rehearing are absolutely barred in the D.C. Court of Appeals and that the lower court did not rule on the merits of the federal question. Petitioner Words, Inc.'s efforts to invoke appeal jurisdiction on the basis of the May 30, 2002 appeal-intent documents, was part of an effort to have the D.C. Court of Appeals reverse its original (November 27, 2002, App. 49) dismissal of Words, Inc.'s appeal. Even if the new round of motions on the functional equivalent, notice of appeal issue was untimely under the D.C. App. Rules, the D.C. Court of Appeals considered and rejected petitioner's alternative-document, notice of appeal argument, which was based wholly on F.R.A.P. and federal precedent. *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 21, n. 1 (1952)(circuit court's denial of untimely motion to amend original merits ruling started 90-day clock for petition to this Court). The October 24, 2003 Petition for Writ of Certiorari is timely under these circumstances.

No rule of the D.C. Court of Appeals blocked Petitioner Words, Inc. from filing its December 11, 2002 "Motion to Invoke Appeal Jurisdiction pursuant to May 30, 2002, Rule 41(a)(1) Notice to Superior Court Stating Intent to Appeal and May 30, 2002 'Rule 59(e)' Motion, Each Providing Functional Equivalent of D.C.C.A. Rule 3(a) Notice of Appeal," reprinted in Supplemental Appendix No. 1 at 2-11. The December 11, 2002 Motion was accompanied by a Motion to Stay Mandate and a Petition for Rehearing and

Rehearing En Banc that incorporated the December 11, 2002 Motion and asked the D.C. Court of Appeals to grant jurisdiction on the basis of the two appeal-intent documents filed in the trial court on May 30, 2002. Supp. App. No. 1 at 14-16.

Respondents' current objection to the Petition for Writ as untimely would have traction only if the D.C. Court of Appeals had refused to consider the December 11, 2002 Motion incorporated into the first Petition for Rehearing En Banc, or if the Court of Appeal itself deemed the second round of briefing on the notice of appeal as untimely.[5] The record shows that the D.C. Court of Appeals did have a three-judge panel consider Words, Inc.'s motion to invoke appeal jurisdiction through the May 30, 2002 appeal-intent documents, but the motion was denied. App. 52. Because the denial of the motion to invoke appeal jurisdiction through the May 30, 2002 documents had not been circulated to the D.C. Court of Appeals *en banc*, petitioner Words, Inc. on March 12, 2003 filed a Petition for Rehearing En Banc of the denial of the December 11, 2002 motion to invoke appeal jurisdiction, accompanied by a Motion to Stay issue of the D.C. Court of Appeals mandate. Supp. App. No. 1 at 27-35. The court below circulated this March 12, 2003 Petition for Rehearing En Banc for several months, finally issuing a denial order dated June 26, 2003, App. 53. The lower court never declared Words, Inc.'s second round of briefing on the

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5. D.C. App. R. 14 authorizes the D.C. Court of Appeals to dismiss an appeal for failure to comply with that court's "rules or for any other lawful reason."

notice of appeal issue to be untimely.

In a case decided in the same term as the *Federal Trade Comm. v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 412, 415 (1952), relied upon heavily by respondents, brief in opposition at 8-10, this Court approved filing of a Petition for Certiorari within 90 days of a modified judgment against the Federal Power Commission issued by the U.S. Court of Appeals for the D.C. Circuit, largely because the government's "motion for clarification" though untimely under the circuit court's rules, was "entertained and considered on the merits." *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17, 21, n. 1 (1952). This Court should emphatically reject respondents' unsupported and fanciful assertion in their opposition brief at 11 that Words, Inc.'s March 12, 2003 Petition for Rehearing En Banc was "not entertained or considered on its merits. . . .because the rule of the District of Columbia Court of Appeals did not allow for filing of a second petition for rehearing." Appendix 53 proves that the March 12, 2003 Petition for Rehearing, which was built upon the December 11, 2002 Motion to invoke jurisdiction on the May 30, 2002 appeal-intent documents, was considered by the merits panel and the entire court, and then denied, with no reference to timeliness. These facts constitute a final judgment on the federal question that, like the D.C. Circuit order in *Federal Power Comm. v. Idaho Power Co., supra,* at 1, was properly subject to a Petition for Certiorari filed 90 days thereafter.

In addition to not citing or distinguishing *Federal*

Power Comm. v. Idaho Power Co., the respondents are unable to shoehorn their largely hoary precedents into the procedural setting of this District of Columbia civil matter now subject to a Petition for Writ of Certiorari. As stressed by petitioner in its petition at 7, this District of Columbia court litigation necessarily came to turn on construction of an important Federal law question as to applicability of functional equivalents of F.R.A.P. notices of appeal, see *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). The federal question presented is the Congressional requirement in D.C. Code §11-743 that the D.C. Court of Appeals follow the Federal Rules of Appellate Procedure, which necessarily includes obeying this Court's interpretation of the Federal Rules of Appellate Procedure as to functional equivalents for notices of appeal. In the lead case cited by respondents, *Nebraska Dept. of Banking v. Pink*, 317 U.S. 264 (1942), the petitioner filed a post-judgment motion with the N.Y. Court of Appeals seeking *not to amend the judgment* but merely to have the Court of Appeals confirm that a federal question was presented and had been passed upon by that state court. The contrast with petitioner Words, Inc. and the unsuccessful petitioner Nebraska Dept. of Banking is striking: Words, Inc. used the motions practice of the D.C. Court of Appeals to request that court to reverse its November 27, 2002 denial of jurisdiction and to bring to that court's attention the appeal-intent documents filed with the trial court within 30 days of the merits' order granting summary judgment to the legal malpractice defendants. This petition is squarely governed by *Federal Power Comm. v. Idaho Power*

Co., and not by *Nebraska Dept. of Banking v. Pink.*

Words, Inc.'s Petition should also not be judged under the timeliness criteria of *Federal Trade Comm. v. Minneapolis-Honeywell, R. Co.*, 344 U.S. 206 (1952), cited by respondents in their opposition brief at 8-10. Both the FTC and Minneapolis-Honeywell petitioned the Seventh Circuit over a three-prong penalty order entered by the Commission against Minneapolis-Honeywell for alleged violations of the Robinson Patman Act, 15 U.S.C. §13. On July 5, 1951, the Seventh Circuit vacated Part III of the Commission's order but did not address the Commission's cross-appeal that requested affirmance of all three sections of the Commission order. Well outside the time for a petition for rehearing to the U.S. Court of Appeals for the Seventh Circuit, the FTC filed a "memorandum" with that court reminding the court to sustain Parts I and II of the Commission order *but, like the unsuccessful petitioner in Nebraska Dept. of Banking, supra, not seeking any relief as to the Seventh Circuit's ruling on Part III.* On September 18, 1951, the Seventh Circuit issued what it called a "Final Decree" again ordering Part III reversed and affirming Part I and Part II. When the FTC petitioned for certiorari marking 90 days from the September 18, 1951 court of appeals decision, this Court, over a vigorous dissent by Justice Black, applied a practicality test to find that, because the September 18, 1951 decision was not preceded by a request to alter the July 5, 1951 decision as to Part III, the 90 day time for petitioning for certiorari should commence running from the July 5, 1951 date. *Federal Trade Comm. v. Minneapolis-*

Honeywell R. Co., 344 U.S. at 210. The government's petition was thus determined to be untimely.

In the present case, the federal question pertaining to applying F.R.A.P. principles to Words, Inc.'s May 30, 2002 appeal-intent documents, was not before the D.C. Court of Appeals until Words, Inc. filed the December 11, 2002 Motion to Invoke Appeal Jurisdiction using the May 30, 2002 appeal-intent documents as the functional equivalents of a 30-day notice of appeal. The additional briefing by Words, Inc. on the functional equivalent, F.R.A.P. argument is contained in petitioner's supplemental appendix. All of these filings sought to overturn the D.C. Court of Appeals November 27, 2002 rejection of Words, Inc. appeal. Words' Petition for Certiorari filed within 90 days of the D.C. Court of Appeals ultimate disposition of Words, Inc.'s attempt to reverse the court of appeal's original jurisdictional ruling, was timely in all respects.

Conclusion

The important federal question regarding denial of petitioner's rights under an Act of Congress applying to a District of Columbia court, warrants allowance of this timely petition for writ of certiorari.

Respectfully submitted,

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